(2)

Supreme Court, U.S.
FILED
JAN 4 1996
CLERK

No. 95-693

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES WOODROW MULLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

24 pp

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for money laundering.

2. Whether the court of appeals erred in not applying an amendment to Federal Rule of Criminal Procedure 29(b) retroactively.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bradley v. *School Board of Richmond*, 416 U.S. 696 (1974)	18
Griffith v. *Kentucky*, 479 U.S. 314 (1987)	18, 19
Norris v. *United States*, 190 F.2d 186 (5th Cir. 1951)	18
Stallings v. *Tansy*, 28 F.3d 1018 (10th Cir. 1994)	15
United States v. *Allison*, 908 F.2d 1531 (11th Cir. 1990), cert. denied, 500 U.S. 904 (1991)	12
United States v. *Bauer*, 19 F.3d 409 (8th Cir. 1994)	12
United States v. *Blackman*, 904 F.2d 1250 (8th Cir. 1990)	11
United States v. *Brown*, 31 F.3d 484 (7th Cir. 1994)	10
United States v. *Flynt*, 15 F.3d 1002 (11th Cir. 1994)	10
United States v. *Friedman*, 998 F.2d 53 (2d Cir. 1993)	11-12
United States v. *Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994)	10
United States v. *Isabel*, 945 F.2d 1193 (1st Cir. 1991)	11
United States v. *Jackson*, 983 F.2d 757 (7th Cir. 1993)	11
United States v. *Jenkins*, 928 F.2d 1175 (D.C. Cir. 1991)	13, 14

Cases—Continued: Page

United States v. *Kenny*, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 & 454 U.S. 828 (1981) .. 12, 13
United States v. *Lovett*, 964 F.2d 1029 (10th Cir.), cert. denied, 113 S. Ct. 169 (1992) 10
United States v. *Sliker*, 751 F.2d 477 (2d Cir. 1984), cert. denied, 470 U.S. 1058 & 471 U.S. 1137 (1985) .. 14
United States v. *Thomas*, 8 F.3d 1552 (11th Cir. 1993) 8
United States v. *Thorne*, 997 F.2d 1504 (D.C. Cir.), cert. denied, 114 S. Ct. 568 (1993) 14
United States v. *Zafiro*, 945 F.2d 881 (7th Cir. 1991), aff'd, 506 U.S. 534 (1993) 12, 13
United States v. *Zeigler*, 994 F.2d 845 (D.C. Cir. 1993) 13, 14, 15, 16
Walker v. *Waltham Housing Authority*, 44 F.3d 1042 (1st Cir. 1995) 15
Wright v. *West*, 505 U.S. 277 (1992) 12

Statutes and rules:

18 U.S.C. 924(c)(1) 2
18 U.S.C. 1956(a)(1)(B)(i) 2, 9, 10
21 U.S.C. 843 2
21 U.S.C. 846 2
Fed. R. Crim. P.:
Rule 29 advisory committee's note 17, 19
Rule 29(a) 5, 8
Rule 29(b) 8, 9, 16, 17, 18, 19

Miscellaneous:

3A Charles Alan Wright, *Federal Practice and Procedure* (2d ed. 1982) 18

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-693

JAMES WOODROW MULLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 53 F.3d 312.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1995. A petition for rehearing was denied on July 11, 1995. Pet. App. C1-C3. The petition for a writ of certiorari was filed on October 10, 1995 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petition-

er was convicted of conspiring to distribute marijuana and cocaine, in violation of 21 U.S.C. 846 (Count 1), and of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (Count 3). The district court sentenced him to 124 months' imprisonment, to be followed by a five-year period of supervised release. Gov't C.A. Br. 2-3.[1] The court of appeals affirmed. Pet. App. A1-A9.

1. The evidence at trial established that petitioner and co-defendant Floyd Brown were members of an organization headed by Gene Collins that transported marijuana from Texas to Georgia, where the marijuana was distributed. The evidence also showed that Collins—assisted by petitioner, Brown, and co-defendant Paul Wendell Calhoun—laundered the proceeds of the marijuana sales by using those proceeds to purchase a Vidalia, Georgia, nightclub known as the "292 Club," in the name of a nominee corporation, the Phoenix Timber Company. The government's evidence included the testimony of Collins and

---

[1] A co-defendant, Floyd Brown, who has also petitioned for a writ of certiorari (see *Brown* v. *United States*, petition for cert. pending, No. 95-6419), was convicted of the same offenses and sentenced to a term of 121 months' imprisonment, to be followed by a five-year period of supervised release. Another co-defendant, Paul Wendell Calhoun, was convicted of the money laundering offense and sentenced to a term of 36 months' imprisonment, to be followed by a five-year period of supervised release. The jury acquitted Calhoun of conspiring to distribute marijuana (21 U.S.C. 846) (Count 1), and acquitted petitioner and Brown of using a firearm during and in relation to a drug trafficking crime (18 U.S.C. 924(c)(1)) (Count 4). Co-defendants Darrell Robitzsch and Murphy Stokes were found not guilty of drug conspiracy charges (21 U.S.C. 846) (Count 1) and of using a telephone to facilitate a drug trafficking crime (21 U.S.C. 843) (Count 6). Gov't C.A. Br. 2 & n.1.

other members of his organization, who testified pursuant to plea agreements with the government, and documentary and other evidence corroborating that testimony. See Gov't C.A. Br. 3-15.

Collins' organization began to obtain marijuana from Texas in December 1990, approximately one year after Collins had been released from prison, where he had served a sentence for conspiring to distribute marijuana. Following his release from prison, Collins and Brown rented a 60-acre farm in Stillmore, Georgia, under the name "B & C Farms." After the farm proved unsuccessful growing legal produce, Collins turned to Ceyetano Montez-Flores (Tano), whom Collins had met in prison and who had offered to help Collins reenter the marijuana business after his release. In December 1990, through his connection with Tano, Collins began to obtain marijuana from Texas. Collins also entered into an agreement with James Walter ("Buddy") Williams, another marijuana trafficker, under which Williams and others would sell, in Georgia, the marijuana that Collins had transported there from Texas. Gov't C.A. Br. 3-5.

On Christmas Eve, 1990, Collins met petitioner at the 292 Club and offered to hire him to haul marijuana from Texas to Georgia. Petitioner, who was experiencing financial difficulties, accepted that offer and drove for Collins on three marijuana-related car trips to Texas. Petitioner also transported marijuana within Georgia for Collins. Petitioner also helped Collins to obtain his probation officer's permission to travel freely in connection with his marijuana business, by purporting to substantiate Collins' false statement to the officer that Collins' travel would be for a lawful job with petitioner at a logging supply

company. Between December 1990 and March 1991, the Collins organization had eight drivers and four trucks that traveled between Texas and Georgia on marijuana-related business; those drivers included petitioner and Brown. Pet. App. A1-A2; Gov't C.A. Br. 6-9.

In December 1990 and January 1991, Collins and petitioner discussed starting a timber business, to be known as the Phoenix Timber Company (PTC), and to be incorporated under the names of other persons. The project, however, was delayed by persistent rainy weather; by the time PTC was actually incorporated on January 29, 1991, under the name of petitioner's girlfriend, Collins and petitioner had abandoned their plan of entering the timber business. Instead, Calhoun, Collins' attorney, had recommended to Collins that Collins incorporate PTC and that he use the new corporate entity to purchase the 292 Club with proceeds of narcotics sales, because the authorities would be unable to trace that purchase to Collins. Gov't C.A. Br. 9-10.

Collins thereafter arranged to purchase the 292 Club from its owner, Dan McSwain, for $53,000. In January 1991, Collins gave McSwain $5,000 in cash proceeds of marijuana sales as a down payment for the club. McSwain, however, advised Collins that he could not keep the entire $5,000 in cash and would require an alternative form of payment. Collins thereupon instructed petitioner and Brown each to go to a separate bank and to obtain a $2,000 cashier's check that showed Calhoun (not Collins) as the remitter. As Collins testified at trial, petitioner knew that the $4,000 that Collins provided to him and Brown for the cashier's checks represented marijuana proceeds. A cashier's check and a bank money

order, both for $2,000 and both payable to McSwain, were in fact obtained with cash at local banks around January 22, 1991. Both instruments showed Calhoun as remitter. Pet. App. A2; Gov't C.A. Br. 10-11.

When Collins returned from Texas, he asked petitioner and Brown whether they had obtained the cashier's checks. Petitioner and Brown assured Collins that they had done so, and that, pursuant to petitioner's intructions, they had taken the checks to Calhoun's secretary. McSwain thereupon met with Collins at Calhoun's office, and exchanged the $5,000 in cash that Collins had given him for the cashier's check, the bank money order, and $1,000 in cash. Collins later used an additional approximately $50,000 in marijuana proceeds to complete the purchase of the club by PTC. Gov't C.A. Br. 11-13.

In late January 1991, Tano called Collins from Texas, stated that he had 800 pounds of marijuana, and asked Collins to come pick up that marijuana in a truck, and to bring $200,000 in cash with him. At Collins's direction, Williams and others brought trash bags containing $200,000 to the 292 Club. Williams, petitioner, and several other members of Collins' organization counted the $200,000 while Brown served as lookout. Petitioner was wearing a pistol in a shoulder holster; Collins described him as "my bodyguard." Shortly thereafter, in early February 1991, Collins' organization began to unravel when four of his drivers were arrested in Austin, Texas. Gov't C.A. Br. 13-15.

2. At the close of the government's case, petitioner moved under Federal Rule of Criminal Procedure 29(a) for a judgment of acquittal on the money laundering count. Pet. App. B2-B3. The district court stated that, although it had "some concerns" over

the Rule 29 motions filed by petitioner and his co-defendants, it would "provisionally" deny those motions. *Id.* at B3. Petitioner thereafter testified in his own defense. He denied knowing that Collins was in the drug business and participating in that business or the laundering of its proceeds. See *id.* at A2-A3; Gov't C.A. Br. 15-16. At the close of the defense cases, the court advised petitioner and his co-defendants that it would consider their motions for judgments of acquittal as having been renewed. The court thereupon denied those motions. Pet. App. B3.

3. A divided panel of the court of appeals held that the evidence was sufficient to support petitioner's money laundering conviction. Pet. App. A1-A9.[2] The court held that the government's evidence alone "was possibly enough to prove guilt beyond a reasonable doubt," because that evidence had shown that petitioner "knew that Collins' money came from the marijuana business," and because "the fact, among other things, that [petitioner] showed Calhoun as the remitter of the check might properly allow a jury to infer that [petitioner] knew the purchase of the 292 Club was intended to hide Collins' drug proceeds." *Id.* at A2. The court stated, however, that it was unnecessary "to decide finally whether the government's evidence alone was enough to prove guilt." *Ibid.* The court explained that when a defendant whose motion for a judgment of acquittal at the close of the government's case is denied takes the stand in his own

---

[2] The court of appeals unanimously and summarily affirmed the drug conspiracy convictions of petitioner and Brown, and the money laundering convictions of Brown and Calhoun. See Pet. App. A1 n.1; *id.* at A4 (Moye, D.J., concurring and dissenting).

defense, he risks bolstering the government's case. Moreover, the court stated, "a statement by a defendant, if disbelieved by the jury, may be considered as *substantive evidence* of the defendant's guilt," because the jury may "conclude [that] the opposite of his testimony is true." *Id.* at A3.

In this case, the court of appeals noted, petitioner had testified "that he did not know that Gene Collins was in the drug business" and "that he was in no way involved in helping Collins buy the 292 Club." Pet. App. A3. And, the court stated, the jury, "hearing [petitioner's] words and seeing his *demeanor*, was entitled to disbelieve [his] testimony and, in fact, to believe the opposite of what [he] said." *Ibid.* The court explained (*ibid.*) (citations omitted):

> At least where some corroborative evidence of guilt exists for the charged offense (as is true in this case where, for example, there was evidence that [petitioner] helped convert cash to a cashier's check to advance the purchase of the 292 Club) and the defendant takes the stand in his own defense, the defendant's testimony, denying guilt, may establish, by itself, elements of the offense. This rule applies with special force where the elements to be proved for a conviction include highly subjective elements: for example, the defendant's intent or knowledge, such as knowing the purchase of the 292 Club was intended to hide Collins' drug proceeds. Experience tells us that, where the issues in litigation involve highly subjective matters, the appearance and demeanor of the witnesses is of particular significance.

The court of appeals also rejected the dissenting judge's argument that a recent amendment to Federal

Rule of Criminal Procedure 29(b) allowed petitioner to challenge the sufficiency of the evidence presented solely in the government's case-in-chief. That amendment provides that, when a district court "reserves decision [on a motion for judgment of acquittal], it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b) (effective Dec. 1, 1994). The court of appeals noted that petitioner's case had been tried before the December 1, 1994, effective date of the amendment, and that retroactive application of the amended rule was "neither just nor practical." Pet. App. A2 n.3. Moreover, the court noted, circuit precedent before the effective date of the amended rule provided that a defendant who presents evidence waives the right to appeal the denial of a Rule 29(a) motion made and denied at the close of the government's case, and may instead challenge only the sufficiency of "all evidence presented in the case, including evidence put on by the defendant." *Ibid.* (citing *United States* v. *Thomas*, 8 F.3d 1552, 1558 n.12 (11th Cir. 1993)).

Senior District Judge Moye dissented. Pet. App. A4-A9. He argued (*id.* at A4) that the evidence in the government's case-in-chief was insufficient to support petitioner's money laundering conviction. He further argued that the majority had erred in holding that petitioner's disbelieved testimony could be treated on appeal as substantive evidence of his guilt. That approach would render insufficiency claims "unreviewable" in any case in which a defendant testified on his own behalf, Judge Moye argued, because an appellate court is inherently incapable of evaluating such demeanor evidence. *Id.* at A4-A5. Judge Moye also argued (*id.* at A8-A9) that the court of appeals should have applied to petitioner's case the version of

Rule 29(b) effective December 1, 1994. Applying that Rule would require reversal of petitioner's conviction, in Judge Moye's view, because the government's evidence standing alone had not been sufficient to establish petitioner's guilt on the money laundering count. *Id.* at A8.

ARGUMENT

1. Petitioner argues (Pet. 4-7) that the court of appeals erred in holding that a defendant's testimony denying guilt may, in certain circumstances, be considered by a reviewing court in determining whether the evidence of guilt was sufficient. While there is some disagreement among the courts of appeals as to the circumstances under which such testimony may be taken into account in determining sufficiency, the court of appeals' decision in this case was correct under any approach to that question. This case therefore does not present a suitable vehicle for resolving that conflict. Moreover, a recent amendment to Federal Rule of Criminal Procedure 29(b) has largely obviated that question, by enabling defendants in many cases to preserve the right to claim on appeal that the evidence presented by the government, standing alone, was insufficient.

a. To support a conviction for violating the money laundering statute, 18 U.S.C. 1956(a)(1)(B)(i), the evidence must establish that the defendant engaged in a financial transaction involving the proceeds of unlawful activity, that the defendant knew that the property represented the proceeds of a specified unlawful activity, and that the defendant knew that the transaction was designed, in whole or in part, "to conceal or disguise the nature, the location, the source, the ownership, or the control of the

proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(1)(B)(i); see *United States* v. *Brown*, 31 F.3d 484, 488 n.2 (7th Cir. 1994); *United States* v. *Flynt*, 15 F.3d 1002, 1007 (11th Cir. 1994); *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1473 (10th Cir. 1994). The concealment element of the statute is met when a transaction is designed "to conceal or disguise *in any manner*" the relevant features of the proceeds of unlawful activity. *United States* v. *Lovett*, 964 F.2d 1029, 1034 n.3 (10th Cir.), cert. denied, 113 S. Ct. 169 (1992).

Although the panel majority based its holding that the evidence was sufficient on all the evidence at trial, the panel's explanation of why the evidence introduced in the government's case-in-chief was, by itself, "possibly enough" to support petitioner's money laundering conviction demonstrated the sufficiency of that evidence. That evidence showed that petitioner had assisted Collins to conceal the proceeds obtained from the distribution of marijuana, by helping Collins to use that money to purchase the 292 Club. In particular, petitioner, having been given $2,000 in proceeds of marijuana sales by Collins, used those funds to buy a $2,000 cashier's check or money order—not under Collins' name, but under the name of a third party, defendant Calhoun. That instrument (and the $2,000 cashier's check or money order similarly obtained by Brown) were then used to help finance Collins' purchase of the 292 Club.

As the panel majority recognized, the jury could infer from the fact that petitioner had "showed Calhoun as the remitter of the check" that petitioner "knew the purchase of the 292 Club was intended to hide Collins' drug proceeds." Pet. App. A2. That inference was supported by the direct testimony of Collins that petitioner was aware that the $2,000 that

he was told to convert into a cashier's check were the proceeds of marijuana sales. It was also supported by petitioner's awareness—as a member of Collins' organization—that Collins was in the business of transporting and distributing marijuana. The inference that petitioner knowingly assisted Collins to hide his drug proceeds was also supported by the fact that petitioner had knowingly assisted Collins to conceal the unlawful nature of his activities on another occasion: when petitioner helped Collins to obtain the permission of his parole officer to travel by falsely stating that Collins would be traveling in connection with legitimate business. See Gov't C.A. Br. 8-11; Gov't C.A. Supp. Br. 9-11; see also *United States* v. *Jackson*, 983 F.2d 757, 766 (7th Cir. 1993) (circumstantial evidence alone is sufficient to support a money laundering conviction); *United States* v. *Blackman*, 904 F.2d 1250, 1257 (8th Cir. 1990) (same); cf. *United States* v. *Isabel*, 945 F.2d 1193, 1203-1204 (1st Cir. 1991). Thus, taking into account solely the evidence offered in the government's case-in-chief, the evidence was sufficient to support petitioner's money laundering conviction.

b. The court of appeals held (Pet. App. A2-A3) that it was not necessary to reach the issue whether the evidence offered during the government's case-in-chief was alone sufficient because the jury was entitled to disbelieve petitioner's testimony denying any knowledge of or participation in illegal activity, "and, in fact, to believe the opposite of what [petitioner] said." It is well established that, in addition to considering affirmative evidence of guilt, a jury may draw negative inferences from a defendant's testimony and consider those inferences in reaching a verdict. See *United States* v. *Friedman*, 998 F.2d 53,

57 (2d Cir. 1993) (jury entitled to draw negative inferences from defendant's testimony at trial); *United States* v. *Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991) (where defendant takes the stand "and denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence"), aff'd, 506 U.S. 534 (1993); *United States* v. *Bauer*, 19 F.3d 409, 412 n.2 (8th Cir. 1994) (same); *United States* v. *Kenny*, 645 F.2d 1323, 1346 (9th Cir.) ("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth."), cert. denied, 452 U.S. 920 & 454 U.S. 828 (1981); *United States* v. *Allison*, 908 F.2d 1531, 1535 (11th Cir. 1990) (jury may reject defendant's explanation "as a complete fabrication" and view "[the] defendant's false explanatory statement as substantive evidence proving guilt"), cert. denied, 500 U.S. 904 (1991). A plurality of this Court recently concluded that, when a jury disbelieves a testifying defendant, it is "further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, 505 U.S. 277, 296 (1992) (opinion of Thomas, J.).[3]

The question whether a jury may treat a defendant's false testimony as affirmative evidence of guilt is, however, distinct from the question of when an appellate court may consider that false testimony in

---

[3] Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's plurality opinion. 505 U.S. at 278. None of the six Justices who concurred in the judgment disagreed with Justice Thomas's statement that a defendant's testimony could be considered as affirmative evidence of guilt. See *id.* at 297-316. In his opinion concurring in the judgment, Justice Souter stated that a similar state evidentiary rule "has the virtue of much common sense." *Id.* at 315.

evaluating whether the evidence against him was sufficient. On that question, the courts of appeals have reached different conclusions. In *Zafiro*, *supra*, the Seventh Circuit stated in dicta that the false testimony of a defendant in denying the charges against her "becomes evidence of guilt to add to the other evidence" considered in the inquiry into sufficiency. See 945 F.2d at 888. The court acknowledged that the District of Columbia Circuit had expressed concern that "if negative inferences, based on demeanor evidence, were adequate in themselves to satisfy a rational juror of guilt beyond a reasonable doubt, appellate courts might not be able to provide meaningful review of the sufficiency of evidence." *Ibid.* (quoting *United States* v. *Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991)). The Seventh Circuit discounted that concern, however, on the ground that such cases were unlikely to occur because, when there is no evidence of guilt other than an adverse inference from a defendant's disbelieved claim of innocence, the defendant would be entitled to a judgment of acquittal at the close of the government's case and would have no need to testify at all. 945 F.2d at 888. Cf. *Kenny*, 645 F.2d at 1346.

As petitioner notes (Pet. 6), the District of Columbia Circuit has taken a different approach. It has held that, although the substance of a defendant's testimony may be considered in determining the sufficiency of the evidence, it is generally improper for an appellate court to assume that the jury may have drawn negative inferences from a testifying defendant's demeanor. *United States* v. *Zeigler*, 994 F.2d 845, 848-850 (D.C. Cir. 1993); see *United States* v. *Thorne*, 997 F.2d 1504, 1511 (D.C. Cir.) (same), cert. denied, 114 S. Ct. 568 (1993); *Jenkins*, 928 F.2d at 1178-

1179; see also *United States* v. *Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) (reaching same result), cert. denied, 470 U.S. 1058 & 471 U.S. 1137 (1985). The District of Columbia Circuit has reasoned that, if negative inferences based upon the defendant's demeanor while testifying were to be considered in the sufficiency inquiry, it would undermine the protection that appellate review of the sufficiency of the evidence provides against wrongful convictions. *Zeigler*, 994 F.2d at 850. The court explained (*id.* at 849):

> Because we cannot evaluate demeanor, [consideration of demeanor in evaluating sufficiency claims] would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. We would in each case assume the jury correctly evaluated the evidence. In explaining how this could be so in light of the defects in the government's proof, we would reason backwards to the only explanation available—the defendant's demeanor. This sort of approach, beginning with the hypothesis that the jury must have gotten things right, contradicts the reason why appellate courts review convictions for sufficiency of evidence—that juries sometimes get things wrong.

The District of Columbia Circuit has recognized, however, that it is appropriate for an appellate court to consider a defendant's denials of guilt when that "testimony, on its face, [is] utterly inconsistent, incoherent, contradictory or implausible." *Ibid.* In such instances, the court has explained, "an appellate court would have some assurance that when the

defendant said 'black' the jury reasonably could have concluded that the truth was 'white.'" *Ibid.*[4]

While the conflicting approaches articulated by the Seventh Circuit and the District of Columbia Circuit may at some later point warrant resolution by this Court, the present case is not a suitable vehicle for resolving that conflict. First, as we have explained, the evidence presented in the government's case-in-chief was itself sufficient to support petitioner's conviction, for the reasons suggested by the panel majority. Resolution of the issue whether the demeanor of a testifying defendant may be considered by a reviewing court upon a sufficiency challenge would therefore have no impact upon the resolution of this case.

Second, even if the evidence presented in the government's case-in-chief were not itself sufficient, it appears that, even under the approach taken by the District of Columbia Circuit, an appellate court would be entitled to conclude that the jury drew negative inferences from petitioner's denials of guilt. That circuit has held that an appellate court may treat a defendant's denial of guilt as substantive evidence against him when the "defendant's testimony, on its face, [is] utterly inconsistent, incoherent, contradictory or implausible." *Zeigler*, 994 F.2d at 849. That exception applies in this case. As the court of appeals noted, petitioner "testified under oath that he did not know that Gene Collins was in the drug

---

[4] The First and Tenth Circuits have recently noted the disagreement between *Ziegler* and *Zafiro*, but have not found it necessary to decide which view is correct. See *Walker* v. *Waltham Housing Authority*, 44 F.3d 1042, 1049-1050 (1st Cir. 1995); *Stallings* v. *Tansy*, 28 F.3d 1018, 1024 (10th Cir. 1994).

business. He also testified that he was in no way involved in helping Collins buy the 292 Club." Pet. App. A3. Given that the jury found petitioner guilty of distributing marijuana and cocaine as a member of Collins' organization (Count 1), and given the direct and circumstantial evidence pointing to petitioner as a purchaser of one of the two cashier's checks used in the second downpayment for the 292 Club, see Gov't C.A. Supp. Br. 9-12, it is reasonable to conclude that the jury found petitioner's wholesale denials of any knowledge of or involvement in any of Collins' illegal ventures to be wholly incredible. Because petitioner's denials were "utterly inconsistent, incoherent, contradictory or implausible" in light of his conviction on the distribution count and the other evidence in the case, the court of appeals had a reasonable "assurance that when [petitioner] said 'black' the jury reasonably could have concluded that the truth was 'white.'" *Ziegler*, 994 F.2d at 849. Thus, the court was correct to conclude that "the jury, hearing [petitioner's] words and seeing his demeanor, was entitled to disbelieve [his] testimony and, in fact, to believe the opposite of what [he] said." Pet. App. A3 (emphasis omitted).

Finally, in light of the recent amendment to Federal Rule of Criminal Procedure 29(b), it is unlikely that the issue of when a reviewing court may consider a defendant's testimony denying involvement in an offense as evidence of guilt will occur with any frequency. Before that amendment took effect, a defendant who elected to present evidence in a case in which the district court reserved ruling on a motion for a judgment of acquittal at the close of the government's case-in-chief would "run the risk that such evidence will support the government's case."

Fed. R. Crim. P. 29 advisory committee's note (1994 amendment). The recent amendment to Rule 29(b) has relieved the defendant of that risk, by providing that, when a district court has reserved ruling on a motion for a judgment of acquittal, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). The advisory committee note to the amended Rule further states that appellate review of such a ruling will be "similarly limited" to the evidence that had been presented at the time the ruling was reserved. Fed. R. Crim. P. 29 advisory committee's note (1994 amendment).

As a result, in future cases in which a defendant moves for a judgment of acquittal at the close of the government's case-in-chief and in which the sufficiency of evidence presented at that point presents a close question, the district court may simply reserve ruling on such a motion at the close of the government's case-in-chief. Because such action will preserve for appellate review the issue whether the government's evidence alone was sufficient, the issue whether the defendant's denials of guilt could be taken into account in a sufficiency inquiry will not arise. It is true, of course, that that issue may still arise where a district court denies a motion for judgment of acquittal made at the close of the government's case, and where the sufficiency of the government's evidence standing alone presents a close question on appeal. Under Rule 29(b) as amended, however, the defendant would have the opportunity in such cases to ask the district judge to reserve ruling on that motion so as to preserve his right on appeal to challenge the sufficiency of the government's evidence alone, and, where the government's evidence is

not clearly sufficient by itself, it is reasonable to expect that such requests will often be granted. Thus, the issue raised by the petition appears to be of diminishing importance and does not merit review at this time.

2. Petitioner also claims (Pet. 7-10) that the court of appeals erred in not retroactively applying to his case the amendment to Federal Rule of Criminal Procedure 29(b) that took effect December 1, 1994. The court of appeals, however, was correct in not applying that amendment. First, as the court of appeals noted (Pet. App. A2 n.3), the amendment did not take effect until after petitioner's trial had been completed, and, indeed, not until after his appeal had been briefed and argued in the court of appeals. The Rule does not provide for retroactive application. The court of appeals was therefore correct to hold (*ibid.*) that it was "neither just nor practical" to apply that amendment retroactively. Cf. *Norris* v. *United States*, 190 F.2d 186, 188 (5th Cir. 1951) (Federal Rules of Criminal Procedure are not retroactive); 3A Charles Alan Wright, *Federal Practice and Procedure* § 922, at 378 (2d ed. 1982) (rules and amendments not retroactive).[5]

---

[5] Petitioner's reliance (Pet. 8) on *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974), and *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), in support of his claim for retroactive application of the amendment to Rule 29(b) is misplaced. The Court stated in *Bradley* that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. The order that transmitted the 1994 amendments to the Federal Rules of Criminal Procedure provided such direction, by specifying that the amendments were to be applied in pending cases only "insofar as just and practicable." Supreme Court Order, Apr. 29, 1994 (Rehnquist, C.J.); see also Pet. App. A3 n.3 (applying

And it is undisputed that, before the amendment to Rule 29(b), a defendant who put on evidence following the denial of a motion for a judgment of acquittal at the close of the government's case-in-chief would "run the risk that such evidence will support the government's case." Fed. R. Crim. P. 29 advisory committee's note (1994 amendment). Second, even if the amended Rule applied, the district court did not clearly "reserve" decision on petitioner's motion for judgment of acquittal within the meaning of that Rule. Instead, the district court stated (Pet. App. B3) at the time that it was "provisionally" denying the defendants' motions for judgments of acquittal; at the close of the defense cases, the court stated (*ibid.*) that it would treat those motions as having been renewed, and that it was denying them.

In any event, the decision below that the amendment to Rule 29(b) does not apply to this case is not in conflict with any other reported decision. Nor does it present a question of general importance warranting this Court's review.

"just and practicable standard"). As for the Court's statement in *Griffith* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final," 479 U.S. at 328, the Court was discussing new *constitutional* rules, not Federal Rules of Procedure. See *id.* at 320-328 (reviewing Court's post-1965 analyses for "claims of retroactivity of new constitutional rules of criminal procedure").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

JANUARY 1996